

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
SUPPLEMENTAL
BRIEF**

77-1099

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FOR THE SECOND CIRCUIT

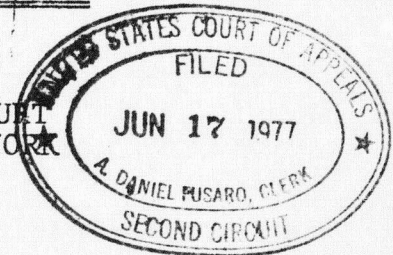
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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
PHILIP ROSATI,
Defendant-Appellant.
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Docket No. 77-1099

SUPPLEMENTARY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
PHILIP ROSATI,
Defendant-Appellant.

UNITED STATES OF AMERICA,
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ON APPEAL FROM A JUDGMENT
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According to the pre-sentence report prepared about appellant Rosati, Government agents had indicated that, on the basis of their investigation, they believed that appellant acted as a "mule" for a well-organized heroin ring during previous trips made by him abroad (Pre-Sentence Report of January 18, 1977, at

5). The report provides no factual information concerning this assertion, and nothing more than this conclusion is presented. At the time of sentence, appellant, through his attorney, disputed the accusation, and asked for a hearing on the issue (Minutes of February 18, 1977, at 10). Counsel also objected to the statement in the report that appellant's employment history was not verified, and demonstrated that many of the jobs listed were verified and that appellant had stubs from one of his employers (Minutes of February 18, 1977, at 12-14).*

Prior to imposing sentence, the judge stated that he was not focusing on the matters in the pre-sentence report raised by counsel in making his sentencing decision, but rather was relying on the information he learned at the trial (Minutes of February 18, 1977). The judge then sentenced appellant as a youth offender, pursuant to 18 U.S.C. §5010(b).

Although the judge did not consider the challenged portions of the pre-sentence report in determining the sentence to impose, the use of the report by the Parole Commission and the Bureau of Prisons renders erroneous the judge's failure either to conduct a proceeding that would have resolved the disputed issues in the report or to discredit the record so as to make reliance on the report improper.

*Counsel also objected (Minutes of February 18, 1977, at 11) to a reference in the report to a lack of cooperation by appellant (Pre-Sentence Report at 6) when appellant had pleaded not guilty and was planning an appeal.

A. Administrative Use of the Pre-Sentence Report

The pre-sentence investigation report is submitted to the Parole Commission, and no initial parole hearing is held without that report (Memorandum from Curtis Crawford, acting chairman of the Parole Commission, to the Bureau of Prisons and the Division of Probation, dated April 18, 1977).^{*} At the initial hearing, determinations are made as to the crime severity category and the salient factor score (28 C.F.R. §2.20) that establish the Commission guideline range for the inmate's custody (28 C.F.R. §2.19(a)(3));^{**} Parole Release Decision Making and the Sentencing Process, 84 Yale L.J. 810 at 830 n.97 (1974) (hereinafter "Project"). Not only is the pre-sentence report in the parolee's file (28 C.F.R. §2.19(a)(3)), but the directive that no hearing will take place without such a report demonstrates its significance to the process.

Determination of the one appropriate offense severity rating^{***} categorizing an inmate's conduct may be based not on the

^{*}A post-sentence report can be used in those instances in which no pre-sentence report is prepared.

^{**}For a complete description of the tables, see Battle v. Norton, 365 F.Supp. 925, 929 (D.Conn. 1973).

^{***}There are six such ratings: low, low moderate, moderate, high, very high, and greatest (28 C.F.R. §2.20).

crimes resulting in the conviction, but on an alleged offense.

Biancone v. Norton, 421 F.Supp. 1043 (D.Conn. 1976); Lupo v.

Norton, 371 F.Supp. 156, 161-162 (D.Conn. 1974).

The Offense Severity Rating reflects the Parole Board's independent, subjective evaluation of the gravity of the inmate's past criminal behavior. Classification on the severity scale is not based on the legal "offense of commitment" or on sentence length; rather, the Board makes its own determination of the inmate's offense behavior, which it then rates relative to "offense behaviors ... commonly seen by the parole board."

Project, 84 Yale L.J. at 824.

The offense severity rating is based on information in the file (Project, 84 Yale L.J. at 835) which, of course, includes the pre-sentence report (28 C.F.R. §2.19(a)(3)). Here, the assertion in the pre-sentence report that appellant was involved in organized heroin smuggling can have a substantial adverse effect on appellant's severity rating by pushing appellant from a "high" crime to a "very high" crime severity rating.* The difference in the two ratings can produce an extension in the period of appellant's custody ranging from eight to sixteen

*The "high crime" rating, as relevant here, includes possession of marijuana worth \$5,000 or more with intent to distribute. The "very high" crime rating, as relevant here, includes possession of hard drugs (heroin) with intent to distribute.

months and may cause him to be retained in custody for the full forty-eight months permitted by the statute.*

The pre-sentence report is also used to determine the salient factors, and thus the salient factor score. Project, 84 Yale L.J. at 833. The scores are used to predict parole success, and affect the determination of which guideline range is appropriate. One of the factors deemed salient is verified employment for a total of at least six months during the last two years in the community. Counsel complained in court that the assertion in the report that the employment record was not verifiable was incorrect. Since the employment record gives one point on the score, an incorrect appraisal of the work record is significant.

The Bureau of Prisons is the other agency which uses the pre-sentence report and from it determines a prisoner's classification. The Bureau of Prisons considers the pre-sentence report as a resource document in making its classification study for each inmate. Bureau of Prisons Policy Statement No. 7200.17,

*The corresponding differences in months of confinement on the youth guidelines chart are as follows:

Salient Factor Score:	Very Good	Good	Fair	Poor
High offense severity	12 to 16	16 to 20	20 to 26	26 to 32
Very high offense severity	20 to 27	27 to 34	34 to 41	41 to 48

(28 C.F.R. §2.20). as amended,
41 Fed. Reg. 37316,
5 37323 (Sept. 3, 1976).

¶5A (October 23, 1975) at 2 (hereinafter "7200.17"). The critical nature of the study is described by the Policy Statement itself:

The Classification Study is a composite of reports and forms submitted by various departments within the institution, and represents the staffs' effort to identify the inmates' needs and design a correctional program to meet those needs.

7200.17 ¶4 at 2.

Indeed, if there is a pre-sentence report in the correctional file, the institution does not prepare its own classification summary as part of the classification study. (7200.17 ¶4D at 2; ¶5E at 4).

Custody classification is determined by consideration of

... degree of escape risk; history of violence or assaultive behavior; length of sentence; type of offense; prior record; threats against government officials; members of subversive organizations; and institutional adjustment.

Bureau of Prisons Policy Statement No. 7300.112 (April 8, 1976) at 3.

Obviously, some of this information is obtained from the pre-sentence report.

The pre-sentence report is thus as important in the correctional process as it is in the judicial.

B. The Remedy

The district judge should take necessary steps to insure that the information in the pre-sentence report is correct or corrected, or that the challenged material is stricken from the report before it is distributed to the Parole Commission or the Bureau of Prisons. He should do this even though he does not himself use the challenged information in imposing sentence, because the sentencing proceeding is the only effective, practicable, and fair way to elicit the correct information.

The administrative proceedings before parole examiners make challenges to the pre-sentence report difficult and success virtually impossible. For example where, as here, the assertion of illegal conduct is purely conclusory, with no factual information -- no names, dates, places -- appellant could not disprove the assertion on a factual basis without the opportunity at least to hear and confront the probation officer to ascertain the hitherto unrevealed source of the information and its basis. Indeed, even in Cardaropoli v. Norton, 523 F.2d 990, 998 (2d Cir. 1974), and Catalano v. United States, 383 F.Supp. 346, 353 (D.Conn. 1974), the courts noted that Bureau of Prisons hearings on special offender status could have limited rights of confrontation and cross-examination precisely because the pre-sentence report contained the source of the information and the nature of the evidence. However, the probation officer who prepared the report is 3,000 miles

from appellant's place of confinement. While this case may be unique in terms of distance, it is surely typical in that a federal prisoner will usually serve his term of custody in a district other than the place of judgment. Since the Parole Commission is not likely to grant subpoenas for witnesses (see Shepard v. Taylor, Doc. No. 77-2030, slip op. 3879 (2d Cir., May 27, 1977)), the likelihood of being able to rebut the conclusory accusation is nonexistent. The difficulty of having people appear at in-prison hearings is substantially obviated by establishing an appropriate district court procedure.

Further, in the district court the potential inmate already has counsel who is familiar with his case and has ready access to the necessary materials and information.

The significance of giving counsel the opportunity to correct the pre-sentence report before it reaches the Parole Commission is manifest by the Commission's own instructions for dealing with the verified employment characteristic of the salient factor chart. According to the instructions, an inmate gets 0 points if employment is unverified. However, even if verification is subsequently obtained, the regional office need not re-open the case, but may do so only if it wishes to do so. United States Parole Commission Revised Salient Factor Scoring Manual (SFS76A), Report 14 at 10. Since the salient factor score is determined before the inmate comes into the hearing room (Project, 84 Yale L.J. at 833), the opportunity to correct a decision based on incorrect information is limited, although

no prejudice would occur if the information were corrected before the Commission received the report.

The opportunity to correct the report is also limited by the very way in which the parole hearing is conducted:

... [I]n very few hearings is every factor on the scale discussed or confirmed. And even those factors that are discussed in the hearings are not raised directly, so the prospective parolee often does not have opportunity to rebut or respond to information derived from the PSI [Pre-Sentence Investigative Report].

Project, 84 Yale L.J. at 834.

The difficulty of rebutting incorrect information used to reach the offense severity rating is virtually insurmountable:

The Offense Severity Rating is generally determined on the basis of information in the inmate's file, with little or no weight given to contradictory accounts provided by the inmate in the hearing. Despite the fact that official reports of offense behavior are at times incomplete, the examiners do not appear to use the hearing as an opportunity to check accuracy or correct possible misinformation relevant to rating an inmate's offense severity. Often, the examiners do not question the inmate about important aspects of alleged offense behaviors which later are included in their reports as justifications for a particular severity rating. Even when examiners make a detailed inquiry into some of the circumstances surrounding what they believe to be the "offense behavior," the inmate's denial of facts appears to have no effect. Inmates sometimes maintain that they did not commit all of the offenses listed in an indictment but not proven at trial or by plea. But in contrast to the credibility accorded inmates' denials of apparently false information relevant to the Salient Factor Score, examiners are reluctant to believe inmate accounts of offense

behavior. When an inmate's version disagrees with the official version, examiners do not point out or explore the discrepancy, but appear instead to evaluate the response for other purposes, usually with an eye to discovering whether the inmate is repentant or willing to accept responsibility for his actions. On the other hand, admissions drawn out in the hearing are relied on.

Project, 84 Yale L.J. at 835-837; footnotes omitted.

The idea of the district judge conducting some type of procedure to correct the report already exists in Rule 32(c) (3). Further, in the Proposed Sentencing Rules prepared by the Second Circuit Committee on Sentencing and adopted by the Second Circuit Judicial Council, it was stated:

When sentence is imposed, the court should:

...

2. Make specific findings on controverted factual issues which the court intends to consider in imposing sentence;

...

4. Direct, where appropriate, that a transcript of the sentencing hearing go forward to the Bureau of Prisons and Board of Parole; where findings have been made on contested issues, the court shall direct that the transcript of such findings go forward to the Bureau of Prisons and Board of Parole.

While the legislative history of Rule 32 (H.R. Rep. No. 94-247, 94th Cong., 1st Sess. at 18 (May 29, 1975)) and the Proposed Sentencing Procedure both refer to the importance of an accurate report for the sentencing determination, the need for correct information is also required for the Parole Commission which,

like the district judge, determines the length of custody.

The precise components of the procedure can be discretionary with the district judge, but if the judge declines to accept any information from the defense on the disputed issues, or if he fails to make a decision on accuracy, the challenged information should be ordered physically stricken from the report so that it does not come before the Parole Commission or the Bureau of Prisons. Even the mere likelihood that information may be inaccurate is enough to justify its exclusion. See United States v. Weston, 448 F.2d 626, 631-634 (9th Cir. 1971); United States v. Malcolm, 432 F.2d 809, 815-816 (2d Cir. 1970); United States v. Latimer, 415 F.2d 1288 (6th Cir. 1969).

The relief appellant should be afforded must be either a de novo sentence proceeding or an order directing the Probation Department to withdraw its previous pre-sentence report and forward a superseding report to the Bureau of Prisons and the Parole Commission in which the portions challenged herein have been excised, and directing those bodies to consider only the superseding report.

CONCLUSION

For the foregoing reasons, a new sentence procedure should be held or the pre-sentence report excised with instructions to the Parole Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 14, 1977

I hereby certify that a copy of this ^{supplementary} brief [REDACTED]
[REDACTED] has been mailed to the United States Attorney
for the Eastern District of New York.

Alvin S. K. [Signature]